No. 90-1527

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IN THE
Supreme Court of the United States
October Term, 1990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLAUDIO CALDERONE and DOMENICO CATALANO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR CLAUDIO CALDERONE AND DOMENICO CATALANO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who has obtained a judgment of acquittal on a broad conspiracy charge may be tried on a separate and narrower conspiracy charge, where the overt acts charged against the deendant in the first indictment are also charged in the second indictment.

2. Whether a defendant who has obtained a judgment of acquittal on a broad conspiracy charge may, consistent with the Double Jeopardy Clause, be tried on substantive counts based on overt acts charged in the earlier indictment.

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OPINION BELOW

The decision of the Court of Appeals [Pet.App. 1a-28a] is reported at 917 F.2d 717.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1990. A petition for rehearing was denied on January 3, 1991 [Pet.App. 29a-30a]. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution Amendment V.

STATEMENT

1. On June 30, 1988, a grand jury sitting in the Southern District of New York returned an indictment against Claudio Calderone, Domenico Catalano and 26 others. *United States v. Adamita,* SS 88 Cr. 217(JES). Count One of the *Adamita* indictment charged all 28 defendants with participating in a wide-ranging multidrug conspiracy between January 1, 1985 and June 30, 1988 that allegedly involved, among other things, the importation of kilograms of heroin from Europe into the United States, sometimes in exchange for kilograms of cocaine; and the distribution of kilograms of heroine and cocaine and multitons of marijuana.

The *Adamita* indictment listed 105 overt acts committed in furtherance of the alleged conspiracy but named either Calderone or Catalano in only eight of them.

Calderone, Catalano and 15 of the original co-defendants stood trial before Distict Judge John E. Sprizzo. At the close of the government's case, the district court entered judgments of acquittal prusuant to Fed.R.Crim.P. 29 for Calderone and Catalano and seven co-defendants. During an extensive colloquey with counsel, Judge Sprizzo stated, as to Calderone:

> There is no question in my mind, and I will say it for the record, that if the government had proceeded against Mr. Calderone with a more narrowly charged conspiracy, I would have sent it to the jury. But you chose *** to charge Mr. Calderone in a massive conspiracy, which according to the government's opening in this case involved all of these things. The fact that he participated in one or two narcotics transactions and that he knows these other conspirators is legally insufficient for that purpose (Tr. 7700-01).
>
> * * *
>
> I am not saying your evidence would not have been sufficient to prove Mr. Calderone to be a member of a heroin conspiracy involving [two alleged co-conspirators], but you didn't charge a heroin conspiracy. You charged a *** broadly based conspiracy that involved different types of drugs. There is no evidence in the record from which I can infer that as to Mr. Calderone [Tr. 7702-03]. [Pet.App. at 4a.]

As to Catalano, Judge Sprizzo stated:

> [t]here is no evidence to permit a rational jury to find that Mr. Catalano was involved in this massive, all encompassing multidrug conspiracy, none whatsoever, under the case law as I know it and upon the case law relied upon by the government. [Tr.7704].
>
> * * *
>
> The case against Catalano is not as strong as it is against Calderone. What evidence is there in this record other than the fact that people have a meeting, *** any knowledge that people were shipping cocaine

> out of the country, that they were bringing heroin back in exchange for cocaine, or that they were discussing multiton marijuana lots? You have at best an ordinary heroin dealer. *** And the government says that at any time they have a kilogram dealing in heroin that automatically the jury can properly infer that this person is charged with activities relating to other drugs—which is not only other drugs, *** but the very peculiar aspect of this distribution of cocaine, which is to sell it abroad in exchange for heroin. Nonsense. The motion is granted (Tr.7707]. [Pet.App. 4a-5a].

2. On October 16, 1989, the government filed a new 28-count indictment against Calderone and Catalano, *United States v. Calderone,* 89 Cr. 786 (RJW). The *Calderone* indictment alleged the activities for which Calderone and Catalano were unsuccessfully prosecuted in *Adamita* in recast conspriacy solely involving the distribution of heroin in New York. Count One charged Calderone and Catalano with participating in a conspiracy between January 1, 1987 and March 31, 1988 to distribute and possess with intent to distribute kilogram quantities of heroin in the New York metropolitan area. The indictment alleged 21 overt acts in furtherance of the conspiracy, 19 of which named either Calderone or Catalano. Counts Two through Twenty-Five charged Calderone and Catalano with using a telephone to facilitate narcotics crimes. Counts Twenty-Six through Twenty-Eight charged them with possession of heroin with intent to distribute it.

On December 8, 1989, Calderone and Catalano filed pretrial motions to dismiss the indictment on double jeopardy grounds. On February 2, 1990, District Judge Robert J. Ward, to whom the *Calderone* case had been assigned, denied the motions from the bench following oral argument. The crux of the district court's ruling on

the conspiracy charge (Count One) was that since the *Calderone* indictment alleged a limited singe-drug conspiracy, in contrast to the massive, three-drug conspiracy, in contrast to the massive, three-drug conspiracy in *Adamita,* the two conspiracies were different. As Judge Ward explained:

> Let me put it this way. I would have no trouble with your [double jeopardy] argument if Judge Sprizzo had permitted that indictment, that charge to go to the jury [and] the jury had found your client not guilty. I would have told the governmant in no uncertain terms this indictment is not appropriate.
>
> But unfortunately what I have here is a directed verdict by a judge who has based his determination on a decision that he made that the government didn't charge a heroin conspiracy. [Pet.App. 6a-7a].

Judge Ward concluded that "since [Judge Sprizzo] determined there was no charge of a heroin conspiracy [in *Adamita*], the defendants were not placed in double jeopardy and therefore the present prosecution alleging a heroin conspiracy does not constitute 'double jeopardy.' " Judge Ward also denied the motions insofar as they sought dismissal of Counts Two through Twenty-Eight of the indictment.

Calderone and Catalano then brought an interlocutory appeal before the Second Circuit. After the Court of Appeals heard oral argument, this Court decided *Grady v. Corbin,* 110S. Ct. 2084 (1990), which established a new rule for double jeopardy claims arising in the context of successive prosecutions. The Court of Appeals directed the parties to submit letter briefs addressing the impact of *Grady* on the interlocutory appeal.

Writing for the Court of Appeals, Judge Pratt concluded that the "same conduct" test announced in *Grady* bars prosecution of all counts of the *Calderone* indictment, reversed the order of the district court and remanded the case for dismissal of the indictment [Pet.App.1a-11a]. In holding that the "same conduct" test applies to all double jeopardy claims arising in the context of successive prosecutions, Judge Pratt announced that to the extent *United States v. Korfant,* 771 F.2d 660 (2d Cir.1985) (per curiam) and other Second Circuit opinions in this area conflict with *Grady,* "they are no longer good law." [Pet.App. 10a]. Judge Newman, concurring in a separate opinion [Pet.App.12a-22a], stated that *Grady* was intended to apply to cases such as this where "conduct prosecuted at the first trial is or may constitute the entirety of an element of the offense at the second trial." [Pet.App.16a]. Judge Miner dissented [Pet.App.22a-30a], maintaining that the majority decision applied *Grady* too broadly. In determining that the *Korfant test is applicable,* Judge Miner concluded that "[c]onfronting us...are two entirely different consiracies, and, while evidence that tends to prove the existance of one may also tend to prove the existance of the other, *Grady* affords no double jeopardy protection under such circumstances." [Pet.App.26a]

ARGUMENT

The Court of Appeals applied the correct legal standard to the facts and circumstances of this case. Its determination "that the same conduct rule announced in *Grady* bars prosecution of all counts in the *Calderone* indictment" [Pet.App.12a] is correct and does not conflict with any decision of this Court. Further review is not warranted.

1. The Court of Appeals' decision is consistent with this Court's decision last term in *Grady v. Corbin,* 110 S.Ct. 2084 (1990). In *Grady,* this Court directed courts to follow a two-step analysis in resolving double jeopardy claims arising in the context of successive prosecutions: First, the court must apply the *Blockburger* test and its traditional exceptions to determine whether the offense charged in the subsequent prosecution "requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *see generally Grady,* 110 S.Ct. at 2090-93. If the indictment survives this first stage of analysis, then the court must apply *Grady's* "same conduct" test which "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitues an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2082.

Petitioner contends that the Court of Appeals erred by seeking to apply *Grady* to determine whether a course of conduct can contitutionally be treated as multiple violations of the same statute, thereby displacing the traditional totality-of-the-circumstances approach [Pet.11-12]. Petitioner's contention is simply an attempt to prevent the application of *Grady* to conspiracy prosecutions.

In rejecting petitioner's contention that the conspiracy count of the *Calderone* indictment would not require proof of conduct that constitutes an offense for which Calderone and Catalano have already been prosecuted, the Court of Appeals noted that "[t]he conduct in most conspiracy cases, as was the conduct in *Adamita,* is the focus of the case." [Pet.App. 10a]. The Court of Appeals correctly stated that "[u]nder *Grady,* this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in

that the indictment happens to describe it differently." [Pet.App. 10a-11a].

In determining that petitioner's approach "would nullify *Grady* by recasting it as an alternative formulation of *Blockberger*" [Pet.App.11a], the Court of Appeals correctly determined that " if we simply were to compare the 'agreements' alleged in successive conspiracy prosecutions, we would be looking to the offenses charged, as *Blockburger* requires, rather than to the conduct that constitutes the offenses, as *Grady* demands." [Pet.App. 11a]

Recognizing "the ease with which prosecutors can draft indictments that allege what appear to be separate conspiracies" [Pet.App.11a] [quoting *United States v. Abbamonte,* 759 F.2d 1065, 1068 (2d Cir. 1985)], the Court of Appeals correctly stated that a "double jeopardy test that depends entirely on the agreement charged in the indictment would permit a series of conspiracy prosecutions based on identical conduct, provided that the succeeding indictments allege smaller (or larger, or different) 'agreements' than the ones previously charged." [Pet.App.11a]

Applying this sound analysis, the Court of Appeals correctly concluded that "*Grady's* 'same conduct' test bars prosecution of the conspiracy count of the *Calderone* indictment" [Pet.App. 11a] and "likewise bars prosecution of the substantive telephone and distribution counts." [Pet.App. 12a]. The Court of Appeals correctly stated that "[a]lthough Calderone and Catalano were not charged with these specific crimes in *Adamita,* they were nonetheless prosecuted for the *conduct* that supports these offenses." And under *Grady,* they may not again be prosecuted for this conduct, even though the charges are brought under different criminal statutes [Pet.App.12a] [emphasis in original].

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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